82-1812

No.....

Office-Supreme Court, U.S.
FILED
MAY 7 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

LEROY B. FORTNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

J. PATRICK GREEN

2133 California Street
Omaha, NE 68178
(402) 280-3098

JOHN J. BATTERSHELL

116 West "E" Street
McCook, Nebraska 69001
(308) 345-3910

Attorneys for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

(1) Where a defendant enters into a stipulation with the state, wherein the state agrees to reduce the charges against him in return for his making a substantial settlement offer to a plaintiff in certain civil litigation interconnected with the criminal proceedings, if the defendant performs his part of the arrangement, does the agreement come within *Santobello v. New York,* 404 U. S. 257 (1971), and is the defendant entitled to specific implementation of the arrangement, if the state attempts to withdraw.

(2) Where a defendant suffers substantial adverse consequence as a result of the state reneging on a bargain concerning charges, such as adverse publicity, disappointed expectations, and the like, may he seek specific implementation of the pleading arrangement even though he has neither agreed to plead guilty or cooperate with the criminal justice system, nor in fact pleaded guilty or cooperated.

TABLE OF CONTENTS

Pages

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision 3

Statement of the Case 5

Reasons for Granting the Writ:

I. The decision of the Nebraska Supreme Court, which limited the reach of *Santobello* to cases in which a defendant has pleaded guilty or provided incriminating evidence is inconsistent with the body of case law which has read that decision to reach all expectations about future state conduct engendered by a deliberate promise of prosecutors to take action with regard to charges in response to conduct by a defendant or a promise of such conduct. 7

II. Where a plea agreement takes the form of a bilateral promissory arrangement, then detrimental reliance is not a prerequisite to enforceability. Particularly is this the case, where the fact of the making of the agreement is a public matter and has substantial psychological impact on a defendant. 9

Conclusion 12

Appendix:

Order of February 17, 1983 and Opinion in the Mandamus Proceeding ..... App. 1

TABLE OF AUTHORITIES

Pages

CASES:

Comm. ex rel. Hancock v. Melton, 510 S. W. 2d 251 (Ky. 1974) 9

Cooper v. United States, 594 F. 2d 12 (4th Cir. 1974) ... 11

Garcia v. The United States, 519 F. 2d 1343 (9th Cir. 1975) 8

Hester v. New Amsterdam Casualty Co., 268 F. 2d 623 (D. S. C. 1967) 10

Meyer v. City of Grand Island, 184 Neb. 657, 171 N. W. 2d 242 (1969) 10

People v. Reagn, 235 N. W. 2d 581 (Mich. 1975) 9

Santobello v. New York, 404 U. S. 257 (1971) 2, 6, 8, 10

Shields v. State, 374 A. 2d 816 (Del. 1977) 9

State ex rel. Fortner v. Urbom, 211 Neb. 309, 318 N. W. 2d 286 (1982) 2

State v. Wells, 197 Neb. 584, 249 N. W. 2d 904 (1977) ... 10

United States v. Minnesota Mining and Manufacturing, 551 F. 2d 1106 (8th Cir. 1977) 8

STATUTES:

Section 28-105 Neb. R. R. S. (1979 Reissue) 5

Sections 28-509 to 28-518 Neb. R. R. S. 5

28 U. S. C. § 1257 (3) 2

TABLE OF AUTHORITIES—Continued

TEXTS:

Pages

Calamari & Perillo, *Contracts II*, §§ 2-24 9

Fried, *Contract as Promise*, pp. 4-5 10

Recent Decisions: Enforcing Plea Bargains: A Step Beyond Contract Law, 40 Mary. L. Rev. 91 (1981) 9

Specific Performance of "Unfulfillable" Plea Bargains, 14 U. Mich. J. L. Ref. 107 11

The Hiram, 1 Wheat. 440 (1816) 10

Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal. L. Rev. 471 (1978) 8, 10, 11

CONSTITUTION:

Amendment 14, United States Constitution 3

No.....

In The

Supreme Court of the United States

October Term, 1982

LEROY B. FORTNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

The Petitioner, Leroy B. Fortner, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in this proceeding on February 16, 1983.

OPINION BELOW

The Supreme Court of the State of Nebraska issued no opinion in this case. It affirmed without opinion in

response to a motion for summary affirmation. However, it had dealt with the issues of the case in a prior mandamus proceeding, *State ex rel. Fortner v. Urbom,* reported at 211 Neb. 309, 318 N. W. 2d 286 (1982) (Order and Opinion appended).

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on February 16, 1983. This petition for certiorari was filed in 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED

(1) Where a defendant enters into a stipulation with the state, wherein the state agrees to reduce the charges against him in return for his making a substantial settlement offer to a plaintiff in certain civil litigation interconnected with the criminal proceedings, if the defendant performs his part of the arrangement, does the agreement come within *Santobello v. New York,* 404 U. S. 257 (1971), and is the defendant entitled to specific implementation of the arrangement, if the state attempts to withdraw.

(2) Where a defendant suffers substantial adverse consequence as a result of the state reneging on a bargain concerning charges, such as adverse publicity, disappointed expectations, and the like, may he seek specific implementation of the pleading arrangement even though he has

neither agreed to plead guilty or cooperate with the criminal justice system, nor in fact pleaded guilty or cooperated.

CONSTITUTIONAL PROVISION

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States Representatives in Congress, the Executive and Judicial Officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of

such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

———o———

STATEMENT OF THE CASE

Petitioner had been the manager of a business in McCook, Nebraska called the McCook Equity Exchange. In December of 1980 he was charged with three counts of theft in excess of one thousand dollars from his employer. Because the theft counts were in excess of one thousand dollars, they were denominated Class III felonies in Nebraska and carried a penalty of not more than 20 years imprisonment or $25,000 fine or both. Section 28-105 Neb. R. R. S. (1979 Reissue); (The Theft Offenses in Nebraska are consolidated into one offense defined by sections 28-509 to 28-518). Under the Nebraska practice the charges are filed by the prosecutor in the county court, which then conducts a preliminary hearing. While the charges were pending in the county court for Red Willow County, the county attorney disqualified himself. The case was then taken over by one of his deputies and by a special prosecutor appointed by the state district court pursuant to statutory authority.

The morning on which the preliminary hearing was scheduled, the attorneys representing the state and the attorney for the petitioner met and entered into a stipulation. The stipulation provided that an offer of settlement had been made to McCook Equity in the amount of $635,000. Because of this settlement offer, whether it was accepted or not, the state agreed to reduce the charges against the petitioner to a single misdemeanor count and recommend a minimum fine, plus costs if the agreement had been accepted, and a fine if it had not been. The preliminary hearing was delayed by reason of the stipula-

tion. The stipulation was filed of record. Thereafter, the deputy county attorney, because of the publicity which the arrangement received, and because of some subsequent doubts about it, determined to withdraw from the case. He therefore approached the district court, which authorized him to withdraw from the case and discharged the special prosecutor. The stipulation had been entered into on March 16, 1981, the deputy county attorney withdrew from the case on March 27, 1981. In the interim, the settlement arrangement had been fully submitted to the plaintiff in the civil case.

A preliminary hearing had been scheduled for March 30, 1981 in the county court. It was stayed, however, until a new special prosecutor was appointed. When a new special prosecutor had been appointed, the two attorneys appointed refused to abide by the settlement arrangement. The petitioner then sought mandamus to compel them to comply. The district court for Red Willow County denied this relief. On appeal, the Nebraska Supreme Court affirmed. Its decision in connection with the mandamus proceeding was bottomed on two alternate grounds. The first ground was that the case was not an appropriate one for mandamus, since the petitioner had an equally plain and speedy remedy by seeking enforcement of the plea agreement or dismissal of the charges in the district court. Alternately, the court held that the agreement contained in the stipulation did not come within *Santobello v. New York*, 404 U. S. 257 (1971). It so held because the petitioner had not pleaded guilty or in any other way cooperated with the criminal justice system as a result of the agreement. The Nebraska Court stated that "by

agreeing to submit a settlement proposal of his civil liability to McCook Equity, he had in no way been subjected to any detrimental reliance." 211 Neb. 309 at 313, 318 N. W. 2d 286 at 288.

The case then returned to Red Willow County. Eventually charges were filed against the defendant in the district court. The defendant sought by motion to dismiss and by plea in abatement to have the stipulation enforced. Relief was denied.

A trial without a jury was then held on a stipulation of facts. The district court found the defendant guilty of one count of theft of a sum over one thousand dollars, a Class III felony, and sentenced the defendant to four to ten years in the Nebraska Penal and Correctional Complex and to a fine of $10,000. An appropriate motion for new trial was filed and overruled. The petitioner then appealed to the Supreme Court of Nebraska, which summarily affirmed his conviction. The filing of this petition followed.

REASONS FOR GRANTING THE WRIT

I. The decision of the Nebraska Supreme Court, which limited the reach of Santobello to cases in which a defendant has pleaded guilty or provided incriminating evidence is inconsistent with the body of case law which has read that decision to reach all expectations about future state conduct engendered by a deliberate promise of prosecu-

tors to take action with regard to charges in response to conduct by a defendant or a promise of such conduct.

There is no dispute that the petitioner followed through on his agreement to make a settlement offer to his former employer. However, in its opinion on the mandamous petition, the Nebraska Supreme Court held that this offer did not constitute "any detrimental reliance" 211 Neb. 313, 318 N. W. 2d 288, on the stipulation. The basis for this holding is not explained. However, it appears to be the Nebraska court's view that the reliance on a plea agreement must amount to a waiver of constitutional right, or the plea agreement does not come within *Santobello v. New York,* 404 U. S. 257 (1971).

In giving such a narrow reading to *Santobello,* the Nebraska court erred. *Santobello* stands for the proposition that, "it is fundamentally unfair for the state to create and then destroy a defendant's expectations. . . . The standards of substantive due process holds the state to a particularly high duty of care when it makes a promise to a defendant in a criminal case . . ." Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Cal. L. Rev. 471, 524-525 (1978). Where the state breaks its promise in a plea bargaining context, or in some other situation in which it makes promises to a defendant in a criminal case, if the defendant suffers detriment, the state must be held to its promise. Westen & Westin, op. cit., 66 Cal. L. Rev. 524-525, 536-537. This is the reading which the cases have given to *Santobello. United States v. Minnesota Mining and Manufacturing,* 551 F. 2d 1106 (8th Cir. 1977); *Garcia v. The United*

States, 519 F. 2d 1343 (9th Cir. 1975); *Comm. ex rel. Hancock v. Melton,* 510 S. W. 2d 251 (Ky. 1974); *People v. Reagn,* 235 N. W. 2d 581 (Mich. 1975). Under this analysis, the fact that the settlement offer was not a waiver of a constitutional right in the criminal case should not prevent the requirement that it be made from being detriment. Had the settlement offer been accepted, it would have bound the petitioner. To risk a $600,000 settlement in a civil case is clearly detrimental reliance on a promise.

II. Where a plea agreement takes the form of a bilateral promissory arrangement, then detrimental reliance is not a prerequisite to enforceability. Particularly is this the case, where the fact of the making of the agreement is a public matter and has substantial psychological impact on a defendant.

The standard analysis of a plea bargain situation has been the analogy of an offer of a unilateral contract. *Recent Decisions: Enforcing Plea Bargains: A Step Beyond Contract Law,* 40 Mary. L. Rev. 91, 96-97 (1981). Such an offer may be revoked at any time until there has either been performance or, at least detrimental reliance on the part of the offeree. Calamari & Perillo, *Contracts II,* §§ 2-24, pages 82-83. The Nebraska Supreme Court adopted this analysis of plea bargains through its reliance on *Shields v. State,* 374 A. 2d 816 (Del. 1977), 211 Neb. 308, 318 N. W. 2d 287, in its opinion on the mandamus petition. However, this analysis has no relevance to the arrangement involved in this case.

Stipulations are generally treated as contracts which bind the parties thereto from the time they are made. See *State v. Wells,* 197 Neb. 584, 249 N. W. 2d 904 (1977). While stipulations are contracts, they "are not as irrevocable as other contracts." *Hester v. New Amsterdam Casualty Co.,* 268 F. 2d 623, 626 (D. S. C. 1967). However, before a stipulation may be revoked, some showing of good cause has traditionally been required. *The Hiram,* 1 Wheat. 440 (1816); *Meyer v. City of Grand Island,* 184 Neb. 657, 171 N. W. 2d 242 (1969). No such showing was made in this case.

Once it is recognized that a contract was revoked in this case, and not an offer, the emphasis on detrimental reliance ceases to be relevant. Reliance has been required in the traditional plea bargaining case in order to demonstrate justifiable expectations engendered by the state. Nevertheless, the operative principal has been that expectations should be vindicated rather than that harm should not be done. In other words, *Santobello* represents an application of the promissory principal which underpins contract law, rather than the principal of detriment upon which tort is bottomed. Fried, *Contract as Promise,* Pages 4-5. The regularity with which specific performance of arrangements that come within *Santobello* has been granted to defendants demonstrates that the expectations engendered, rather than simple reliance, is the central premise of the case. See Westen & Westin, op. cit., 66 Cal. L. Rev. 519-520, and cases there cited. Where, as in this case, the parties have chosen to couch their arrangement in the form of a bilateral contract, then the

expectancy principal justifies specific performance. Westen & Westin, op. cit., 66 Cal. L. Rev. 525 fn. 189.

In any event, a defendant who has entered into a serious plea bargaining arrangement with the state is usually injured when the state backs out. Such a defendant has substantially used up his bargaining power with the state by disclosing his values. Such a weakening of bargaining position is a true loss. *Specific Performance of "Unfulfillable" Plea Bargains,* 14 U. Mich. J. L. Ref. 107, 118, fn. 69. The defendant stakes his trust on the state and undergoes a severe psychological disappointment when the government renegs. This disappointment is easily manipulated by the state to interfere with a defendant's trial strategy. See, Westen & Westin, op cit., 66 Cal. L. Rev. 526. Where as in this case the plea arrangement becomes a matter of public knowledge and engenders significant public criticism, the state's subsequent withdrawal from the arrangement because of the criticism leaves the defendant in a particularly vulnerable position. The fact of plea bargaining is often regarded by the public as antithetical with innocence. The possibility of a fair and impartial jury, once the pleading arrangement becomes widely known, is problematic. For all of these reasons once the state has seriously given its word, it should not be allowed to reneg. See *Cooper v. United States,* 594 F. 2d 12 (4th Cir. 1974).

———o———

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment of the Supreme Court of Nebraska.

Respectfully submitted,

J. Patrick Green

2133 California Street
Omaha, NE 68178
(402) 280-3098

John J. Battershell

116 West "E" Street
McCook, NE 69001
(308) 345-3910

Attorneys for Petitioner

APPENDIX

Order of February 17, 1983

Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B (2).

Opinion in the Mandamus Proceeding

HASTINGS, J.

The relator, Leroy B. Fortner, filed a motion in the District Court seeking an alternative writ of mandamus against the respondents, Ward Urbom and David Urbom, to compel respondents to carry out an agreement not to prosecute relator. From a judgment overruling the motion and denying the writ, the relator has appealed.

Certain criminal charges were pending in the county court of Red Willow County against Fortner involving a relationship with McCook Equity Exchange. The State of Nebraska, through a Red Willow County deputy county attorney and a special prosecuting attorney, entered into a stipulation with Fortner in the criminal case pending in county court. The agreement provided generally that an offer had been made (presumably by Fortner) to McCook Equity to settle all civil cases pending for the approximate amount of $653,000. The agreement further provided that whether the offer was accepted by McCook Equity Exchange or not, all pending charges against Fortner arising out of his employment by McCook Equity as general manager would be reduced to one misdemeanor. In addition, the prosecuting attorneys agreed to recommend that a fine plus costs be the only penalty assessed against Fortner.

The settlement was never completed. Because of certain developments, the deputy county attorney and the special prosecuting attorney either withdrew or were removed from the case, and the respondents were appointed as special prosecutors to replace them. The State of Nebraska, through its representatives, has refused to abide by or carry out the agreement set forth in the stipulation. As a matter of fact, both parties concede in their briefs that all charges or complaints pending in county court were dismissed by the respondents, who then filed a new complaint in the District Court charging five separate felony counts.

Fortner's only assignment of error is that the District Court erred in refusing to issue a writ of mandamus. In order to resolve that issue, we must address two preliminary questions. First, is mandamus a proper remedy for use in a criminal case to attempt to enforce the terms of an agreement not to prosecute, and, secondly, was the State entitled to unilaterally withdraw or revoke the agreement under the circumstances of this case?

"The writ of mandamus may be issued to any . . . person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. . . ." Neb. Rev. Stat. § 25-2156 (Reissue 1979). "Mandamus is an extraordinary remedy which is not awarded as a matter of right. . . . The writ should not issue where there is another plain and adequate remedy available." *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 814, 277 N. W. 2d 246, 248 (1979).

Fortner had another plain and adequate remedy by way of a motion requesting the District Court to enforce

the agreement or dismiss the felony proceedings. See *State v. Thompson,* 48 Md. App. 219, 426 A. 2d 14 (1981). Therefore, in our opinion, mandamus was not a proper remedy in this instance.

However, there is an additional reason why the writ should not be issued in this case. In support of his contention that he was entitled to enforce what he calls the "plea agreement," Fortner relies upon the rule laid down in *Santobello v. New York,* 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). In that case, the Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.,* at 262. However, in that case, the defendant had pleaded guilty, had changed positions to his detriment, and was then denied the "benefit of his bargain."

All of the other cases cited by Fortner involved a detrimental reliance by the defendant, such as, a plea of guilty, furnishing of evidence of criminal activity, self-incrimination, undercover work, or the like.

Shields v. State, 374 A. 2d 816 (Del. 1977), is more nearly in point with the case at hand. Shields had been indicted for first degree murder and rape. A plea bargain was made whereby he would enter pleas to second degree murder and rape. Later, *and* for reasons never given, the deputy attorney general announced that the State was unilaterally withdrawing from the plea bargain agreement. In denying Shield's motion for specific performance of the agreement, the Delaware court stated:

"We hold that the State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement." *Id.* at 820. To the same effect, see *State v. Wheeler,* 95 Wash. 2d 799, 631 P. 2d 376 (1981).

No plea had ever been entered by Fortner. By agreeing to submit a settlement proposal of his civil liability to McCook Equity, he had in no way been subjected to any detrimental reliance. The evidence is conclusive that he furnished no additional information as to the criminal action. The respondents were well within their rights in refusing to carry out the agreement.

The judgment of the District Court dismissing the relator's motion for a writ of mandamus was correct and is affirmed.

AFFIRMED.